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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978.

No. 78-445

JOAN ANDERSON, DIRECTOR OF ILLINOIS DEPARTMENT OF REGISTRATION AND EDUCATION,

Petitioner,

vs.

BARBARA BARASA, ET AL.,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX.

	PAGE
Question Presented	1
Reasons for Denying the Writ	1
Argument	2
Conclusion	6

TABLE OF CASES CITED.

Borden's Co. v. Baldwin, 293 U. S. 194 (1934)	3, 4
Carrington v. Rash, 380 U. S. 89 (1965)	2
Eisenstadt v. Baird, 405 U. S. 438 (1971)	3
England v. Louisiana State Board of Medical Examiners, 263 F. 2d 661 (5th Cir.), cert. den. 359 U. S. 1002 (1959)	3, 4-5
Ferguson v. Skrupa, 372 U. S. 726 (1963)	4
F. S. Royster Guano Co. v. Virginia, 253 U. S. 412 (1920)	2
Hartford Steam Boiler Inspection & Ins. Co. v. Harrison, 301 U. S. 459 (1937)	2
Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61 (1911)	4
Louisville Gas and Electric Co. v. Coleman, 277 U. S. 32 (1927)	2
Mayflower Farms v. Tyne Eyck, 297 U. S. 266 (1936)	3
McLaughlin v. Florida, 379 U. S. 184 (1964)	2
Miller v. Carter, 547 F. 2d 1314 (7th Cir. 1977) aff'd by an equally divided court, 46 U. S. L. W. 4078 (1978)	3

Morey v. Doud, 354 U. S. 457 (1957) 6
Reed v. Reed, 404 U. S. 71 (1971) 3
Williams v. Rhodes, 393 U. S. 23 (1968) 3
Williamson v. Lee Optical of Oklahoma, 348 U. S. 483 reh. den., 349 U. S. 925 (1955) 4

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QUESTION PRESENTED.

Whether federal courts, in applying the "Rational Relationship" test to equal protection and due process challenges to a State statute, when a showing of arbitrariness has been made may require a state to come forward with an explanation of the purpose of the statute in order to determine its constitutionality.

REASONS FOR DENYING THE WRIT.

This case does not raise any novel or important legal questions. It merely involves application in a particular case of well-established standards for judicial review of state legislation.

This case is not ripe for review. The Seventh Circuit Court of Appeals has remanded the matter to the District Court for taking evidence. No discovery has yet been done, no testimony

has been considered by the lower courts nor have affidavits been filed. The Seventh Circuit decided that the record is inadequate to determine the constitutional questions raised. It would therefore be premature for this Court to review this matter before a fuller record has been made.

The State is seeking this review in order to avoid judicial review of all Illinois statutes enacted prior to 1971, a purpose which is contrary to established rulings of this Court.

ARGUMENT.

I. The Seventh Circuit Correctly Applied the Well Established Standards of This Court for Reviewing Equal Protection and Due Process Challenges to State Legislation.

The method for reviewing equal protection challenges to state legislation has been restated so often, that it is axiomatic. The Equal Protection Clause of the 14th Amendment to the U. S. Constitution applies to the exercise of all state powers which can affect the individual or his property. It does not forbid classification; however the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the *object* of the legislation. See, *e.g., F. S. Royster Guano Co.* v. *Virginia,* 253 U. S. 412, 415 (1920), *Louisville Gas and Electric Co.* v. *Coleman,* 277 U. S. 32, 37 (1927).

It is precisely the obligation of our federal courts to determine whether a given statute is reasonably related to a legitimate objective of government. To determine this, courts must explore the purpose of each statute: "the courts must reach and determine the question whether the classification drawn in a statute are reasonable in light of its purpose. . . ." *McLaughlin* v. *Florida,* 379 U. S. 184, 191 (1964), *Carrington* v. *Rash,* 380 U. S. 89 (1965). "In determining whether or not a state law violates the Equal Protection clause, we must consider the facts

and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." *Williams* v. *Rhodes,* 393 U. S. 23, 30 (1968).

In the present case, the State of Illinois is seeking to circumvent the Courts' inquiry into the "facts and circumstances behind the law, the interests which the State claims to be protecting." Here the Plaintiffs, who are a group of qualified midwives, have shown that the state law denying them licenses is discriminatory and apparently arbitrary. The Seventh Circuit Court of Appeals, seeing that it had no record before it, concluded that in order to determine whether this particular statute is constitutional, the District Court would have to inquire further:

> The question remains, however, whether the district court can satisfy even this limited judicial review function by "imagining" health and safety factors supporting the statute and its classification between presently licensed and non-licensed, but qualified, midwives rather than requiring the State to present in some fashion its justifications for the legislation. We conclude that it cannot. (Opinion below, Appendix A to Petitioner's Brief, p. A5.)

Such an inquiry into the purpose of a law is certainly routine. This Court has often stated that courts must inquire into the reason for a discrimination. "Discriminations are not to be supported by mere fanciful conjecture." *Borden's Co.* v. *Baldwin,* 293 U. S. 194, 209 (1934), *Hartford Steam Boiler Inspection & Ins. Co.* v. *Harrison,* 301 U. S. 459, 462 (1937), *Mayflower Farms* v. *Ten Eyck,* 297 U. S. 266, 274 (1936). See also *Reed* v. *Reed,* 404 U. S. 71 (1971), *Eisenstadt* v. *Baird,* 405 U. S. 438 (1971).

It has upheld the inquiries of lower courts into the background of a given law. See *e.g. Miller* v. *Carter,* 547 F. 2d 1314 (7th Cir. 1977) aff'd by an equally divided court, 46 U. S. L. W. 4078 (1978), *England* v. *Louisiana State Board of Medical Examiners,* 263 F. 2d 661 (5th Cir.) *cert. den.* 359 U. S. 1002 (1959).

The extent of each inquiry is a matter for the lower courts to decide—it is hardly an issue of such importance as to take up the time and resources of this Court.

The Petitioner has argued that it should not have to justify the challenged statute because state laws are entitled to a presumption of validity. Yet that presumption is a rebuttable one, and can in no way negate the citizens' rights to judicial review of state legislation. *Borden's Co.* v. *Baldwin*, 293 U. S. 194, 209 (1934), *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61 (1911).

In virtually every case relied upon by petitioner, the Courts decided the constitutionality of the statutes before them by reviewing a well-developed record. See *e.g.*, *Williamson* v. *Lee Optical of Oklahoma*, 348 U. S. 483 *reh. den.*, 349 U. S. 925 (1955), *Ferguson* v. *Skrupa*, 372 U. S. 726 (1963).

The fact that this case involves a challenge to medical legislation does not remove the Court's obligation to review the background and purpose of the law. Indeed, because the statute would outlaw a long-standing medical profession, the profession of mid-wifery, a fuller inquiry is appropriate. The case of *England* v. *Louisiana State Board of Medical Examiners, supra*, is controlling. In *England* a group of chiropractors challenged legislation which had the effect of excluding all chiropractors from practicing in the State of Louisiana. The Fifth Circuit Court of Appeals remanded the case for an evidentiary hearing holding that the case could not be disposed of on a motion to dismiss:

> [A] state cannot outlaw an allegedly useful and lawful profession without a 'reasonable' or rational' basis for so doing. The Plaintiffs say that no such basis exists and the Defendants say it does. We must, upon motion to dismiss (treated as summary judgment), take the Plaintiffs' allegations as true. Thus taken, they make out a prima facie case under existing law."

* * *

> [T]he plaintiffs are entitled to a day in court, to an opportunity to prove their case." 263 F. 2d 661 at 674, 663.

The Court reaffirmed the "solemn and inescapable duty" of the courts to review state legislation in the fields of health and welfare. *Id.*, p. 663. It is that responsibility which the Seventh Circuit is honoring by remanding this matter to the District Court:

> In order to make a determination on that question [whether the legislation is arbitrary], it is necessary that a federal court be given enough power to require the state to come forth with some evidence suggesting why a Statute was passed and what social benefit is expected to flow from that Statute. Anything less would require us to abdicate our responsibility to consider the constitutionality of State legislation that did not create a suspect classification or affect a fundamental interest. The Supreme Court has never adopted such an extreme position. (Opinion Below, Appendix A to Petitioner's Brief, p. A6.)

Very simply, the State seeks review by this Court in order to avoid a factual inquiry into the basis for the challenged legislation perhaps because it cannot justify the legislation. The state has not raised an issue which merits the granting of certiorari in this matter.

II. The State Is Not Entitled to Circumvent Judicial Review Merely Because No Legislative History Exists for Pre-1971 Legislation.

The State of Illinois is seeking to avoid judicial review of all statutes passed prior to 1971 when the State began to compile a legislative history. It claims that because no legislative history was compiled prior to 1971, it cannot demonstrate the "rational basis" of any challenged statute. The state's position is manifestly against the traditions of judicial review established by this Court.

The Courts have conducted countless reviews of state statutes without the benefit of legislative histories. See *e.g.*

review of a pre-1971 Illinois law exempting the American Express Co. from certain licensing regulations. *Morey* v. *Doud*, 354 U. S. 457 (1957). States have explained their objectives in the legislation being challenged, and the Courts have sustained or overturned the statutes. Certainly the State has available to it many ways, apart from an official legislative history, to justify a piece of legislation.

What the Seventh Circuit has ordered the state to do in the present case is "to come forth with *some* evidence *suggesting* why a statute was passed and what social benefit is expected to flow from that statute. "(Opinion below, Appendix, p. A6.) (Emphasis added.) Surely that is not an overly burdensome requirement. Without relying on speculation the State may now produce some evidence of the evils the legislation was designed to eradicate or the benefit it now confers on Illinois' citizens. If no valid purpose exists, then the statute should fall since it is discriminatory and denies respondents their chosen profession.

The decision below correctly requires the State to specify its objectives in the challenged legislation. This requirement folllows well-established legal precedents and does not justify the grant of a writ of certiorari to review the judgment below.

CONCLUSION.

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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